

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
The Evans Broadcast Company, Inc.)	File Number: EB-08-SF-0284
)	
Licensee of Station KCMY(AM))	NAL/Acct. No.: 200932960002
Carson City, Nevada)	FRN: 0011889250
Facility ID # 40801)	

FORFEITURE ORDER

Adopted: November 18, 2009

Released: November 20, 2009

By the Regional Director, Western Region, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture in the amount of three thousand, five hundred dollars (\$3,500) to The Evans Broadcast Company, Inc. (“Evans”), licensee of station KCMY(AM), in Carson City, Nevada, for willful and repeated violation of Section 73.49 of the Commission's Rules (“Rules”).¹ On November 25, 2008, the Enforcement Bureau’s San Francisco Office issued a *Notice of Apparent Liability for Forfeiture* (“*NAL*”) in the amount of \$5,600 to Evans for failing to enclose the KCMY(AM) antenna towers within an effective locked fence or other enclosure.² Evans filed a response (“*Response*”) on December 24, 2008. In this *Order*, we consider Evan’s arguments that it made good faith efforts to comply with the Rules, and that it has a history of compliance with the Rules.

II. BACKGROUND

2. On June 10, 2008, an agent from the Enforcement Bureau’s San Francisco Office inspected KCMY(AM)’s antenna tower site in Carson City, Nevada, and found that large portions of the wooden base fences surrounding each of the two KCMY(AM) antenna towers making up the KCMY(AM) two-tower array were laying on the ground. For one tower, half of the entire fence was laying on the ground. For the other tower, large portions, approximately eight to ten feet wide, were laying on the ground. The agent observed that there was no protective property fence surrounding the KCMY(AM) antenna site. The agent also observed that there was a bike path approximately 100 yards from the antenna site.

3. On June 11, 2008, the San Francisco agent returned to the KCMY antenna site and again found that large segments of the base fences surrounding each of the two KCMY(AM) antenna towers were laying on the ground. The agent also observed that there was no protective property fence surrounding the KCMY(AM) antenna site. The agent then conducted an inspection of the KCMY(AM) main studio and interviewed KCMY(AM) management about the KCMY(AM) fences. The KCMY(AM) manager acknowledged that the fences had blown down two or three times in the past, most recently six or seven weeks earlier. The manager told the agent that the station had attempted to get the fences repaired, and produced a proposal for repairs, but said that the company proposing to do the work was

¹ 47 C.F.R. § 73.49.

² *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200932960002 (Enf. Bur., Western Region, San Francisco Office, released November 25, 2008).

waiting for the ground to dry so that their vehicles did not get stuck in the mud. The agent noted that there was no set date on the proposal for the repair of the fences. The agent warned the KCMY(AM) manager that some type of temporary fencing enclosure had to be erected with warning signs to keep the public from approaching the KCMY(AM) towers. Later that day, the San Francisco agent returned to the KCMY(AM) tower site and observed that orange, plastic temporary fencing had been installed around the two KCMY(AM) tower fences, along with warning signs.

4. On November 25, 2008, the San Francisco Office issued a *NAL* in the amount of \$5,600 to Evans, finding that Evans apparently willfully and repeatedly violated Section 73.49 of the Rules³ by failing to enclose the KCMY(AM) antenna towers within an effective locked fence or other enclosure, but that Evans had demonstrated a good faith effort to attempt to initiate repairs to the fence prior to the inspection by the FCC agent.⁴ In its *Response*, Evans argues that it made good faith efforts to comply with the Rules, that it promptly erected the temporary fence urged by the agent, that the stations gross revenues are marginal, and that it has a history of compliance with the Rules.

III. DISCUSSION

5. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Act,⁵ Section 1.80 of the Rules,⁶ and *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines* ("*Forfeiture Policy Statement*").⁷ In examining Evan's response, Section 503(b) of the Act requires that the Commission take into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.⁸

6. Section 73.49 of the Rules states that antenna towers having radio frequency potential at the base (series fed, folded unipole, and insulated base antennas) must be enclosed within effective locked fences or other enclosures.⁹ The KCMY(AM) antenna towers are series fed. In adopting the *Report and Order* promulgating the most recent amendment of Section 73.49, the Commission stated that "a fencing requirement is necessary to protect the general public."¹⁰ On June 10, 2008, and June 11, 2008, a San Francisco agent inspected the KCMY(AM) antenna tower site and found that, for both towers, the base fences surrounding those towers were missing large portions of the fences, and that there was no protective property fence at the site beyond the base fence. When asked by the San Francisco agent, a KCMY(AM) manger acknowledged that the fences had been blown down several weeks earlier, and that efforts had been made to contract with a company to repair them, but no repairs had been made because

³ 47 C.F.R. § 73.49.

⁴ Pursuant to Section 1.80 of the Rules, 47 C.F.R. § 1.80, the base forfeiture amount for violating the AM tower fencing rule is \$7,000. The San Francisco Office reduced the base forfeiture amount, pursuant to the downward adjustment criteria in Section 1.80, based on its assessment that Evans had engaged in good faith efforts prior to the agent's inspection.

⁵ 47 U.S.C. § 503(b).

⁶ 47 C.F.R. § 1.80.

⁷ 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999).

⁸ 47 U.S.C. § 503(b)(2)(E).

⁹ 47 C.F.R. § 73.49.

¹⁰ *Review of the Technical and Operational Regulations of Part 73, Subpart A, AM Broadcast Stations*, 59 Rad. Reg. 2d (Pike & Fischer) 927, ¶6 (1986) ("*Report and Order*").

of the muddy ground near the fences.

7. In its *Response*, Evans does not dispute that, at the time of the June 10 and June 11, 2008, inspections, the KCMY(AM) towers were not enclosed within an effective fence or enclosure. Evans argues that the fence had blown down earlier in the year and that it had acted responsibly when on April 8, 2008, prior to the agent's inspection, it ordered repairs to be made. The repairs had not yet been made, at the time of the inspection, because the ground surrounding the fence was too wet to allow vehicle access. Evans also argues that at the agents' urging on June 11, 2008, it promptly erected temporary fencing around the two towers and posted warning signs. Consequently, Evans argues that the proposed forfeiture should be cancelled because of its good faith efforts to comply with the Rules, and its history of compliance with Rules.

8. We note that the San Francisco Office, in consideration of Evans' pre-inspection efforts, proposed a reduced forfeiture in the *NAL*. In view of the inability of the station to effect the repairs (including setting cement for fence posts) for which it had contracted prior to the agents' inspection due to the wet ground, a factor outside Evans' control, we will apply an additional good faith reduction to the forfeiture. We decline, however, to cancel the forfeiture. The erection of temporary fencing at the urging of the FCC agent does not warrant any further reduction.¹¹ While Evans asserts its gross revenues are marginal, it did not proffer any of the evidence required for consideration of an inability of pay argument. We have also reviewed our records and we have determined that Evans does have a history of compliance with the Rules. We therefore will reduce the forfeiture amount to \$3,500.

9. We have examined the *Response* to the *NAL* pursuant to the statutory factors above, and in conjunction with the *Forfeiture Policy Statement*. As a result of our review, we conclude that Evans willfully and repeatedly violated Section 73.49 of the Rules. Considering the entire record and the factors listed above, we find that reduction of the proposed forfeiture to \$3,500 is warranted.

IV. ORDERING CLAUSES

10. **ACCORDINGLY, IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended ("Act"), and Sections 0.111, 0.311 and 1.80(f)(4) of the Commission's Rules, The Evans Broadcast Company, Inc., **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of \$3,500 for willfully and repeatedly violating Section 73.49 of the Rules.¹²

11. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.¹³ Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the *NAL*/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to

¹¹ We note that addressing violations of the Rules post-inspection does not provide a basis for a downward adjustment in the proposed forfeiture. The Commission has stated in the past that a licensee is expected to correct errors when they are brought to the licensee's attention and that such correction is not grounds for a downward adjustment in the forfeiture. *AT&T Wireless Services, Inc.* 17 FCC Rcd 21866, 21871-76 (2002); *see also Rama Communications, Inc.*, 23 FCC Rcd 18209, 18211 (EB 2008) ("[W]here lapses in compliance occur, neither the negligent acts nor omissions of station employees or agents, nor the subsequent remedial actions undertaken by the licensee, excuse or nullify the licensee's rule violation").

¹² 47 U.S.C. § 503(b), 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4), 73.49.

¹³ 47 U.S.C. § 504(a).

U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters “FORF” in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures.

12. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class Mail and Certified Mail Return Receipt Requested to The Evans Broadcast Company, Inc., at its address of record, and its counsel of record, Aaron P. Shainis, Esquire.

FEDERAL COMMUNICATIONS COMMISSION

Rebecca L. Dorch
Regional Director, Western Region
Enforcement Bureau